IN THE SUPREME COURT OF MISSOURI

KATINA PIATT,	)	
SALINA NELSON, and	)	
FREDERICK NUNLEY,	)	
	)	
Appellants,	)	
	)	
v.	)	**SC94364**
	)	
INDIANA LUMBERMENS MUTUAL	)	
INSURANCE COMPANY, and	)	
JUNIOR FLOWERS,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT
THE HONORABLE PATRICIA JOYCE, CIRCUIT JUDGE, DIVISION 4

APPELLANTS' SUBSTITUTE REPLY BRIEF

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

There is no dispute this Court has jurisdiction; ILM agrees this Court has jurisdiction. Resp. Subst. Brief, p. 1. Appellants are merely supplementing their Jurisdictional Statement to state specifically that this Court has jurisdiction based on the facts previously provided under the Missouri Constitution Article V, Section 10.

REPLY ARGUMENT

I. Introduction

On the last full page of its brief ILM finally acknowledges, after dozens of pages of saying the opposite, that courts do not look at the *legal* duty (personal or otherwise) to determine coverage, but rather "**look to the facts of the case regarding the scope of the executive officer's duties for the particular corporation**." Resp. Subst. Brief, p. 75 (emphasis added). With respect to the scope of Flowers' duties involving his kiln door order, ILM admits "**[i]t is uncontroverted that the petition alleged that Flowers was acting within the scope of his employment or performance of duties for the corporation**." Resp. Subst. Brief, p. 71 (emphasis added).

But despite *knowing* Flowers was the officer, L.F. 80, and *agreeing* he was sued in the scope of performing duties for the corporation, ILM nonetheless admits "[**i]n assessing Flowers' tender of the defense of the suit, [ILM] did not analyze the claim as one against an executive officer**." Resp. Subst. Brief, p. 18 (emphasis added). ILM refused to properly analyze the claim because it used an incorrect "four corners" test to determine its duty to defend, thinking that no matter what the undisputed *facts* show, "[**a] duty to defend is only triggered if there is a covered allegation in the lawsuit**." L.F. 76 (emphasis added). ILM not only used the wrong duty to defend test, it also misunderstood its coverage, thinking it covers non-viable "**breach of a non-delegable duty of the corporation**" cases, Transfer App., p. 11 (emphasis added), yet not the only type of case a co-employee can pursue against an executive officer in Missouri. Resp. Subst. Brief, p 18 (none of which it told its insured when it refused a defense, L.F. 61-68,

71, 76, 81, 92). ILM's admissions establish how and why it breached its duty to defend. This Court should reverse the trial court and enter judgment for appellants on count II of their petition.

This Court should also enter judgment in favor of appellants on count I of their petition, for equitable garnishment, because (1) ILM is precluded from raising its contract defenses after having vitiated its contract; and (2) ILM admits it does "[n]ot dispute that **Flowers qualified as an insured under the policy in his capacity as an executive officer as to the Reynolds County judgment**." Transfer App., p. 6 (emphasis added) (appellants agree with this too). ILM's admission that Flowers is insured as an officer is an admission that he is not the employer, because the coverage is for an employee, whereas the exclusions are for the employer, and Flowers cannot be both.

II. Reply to ILM's Duty to Defend Argument (ILM's Argument III)

The declination correspondence shows ILM refused a defense for the simple reason that it mistakenly believed no matter what the facts show, "[a] duty to defend is only triggered if there is a covered allegation in the lawsuit." L.F. 76 (email from ILM's adjuster explaining why he was ignoring the information Flowers' attorney provided). *That* is why ILM disregarded the officer facts and officer coverage analysis provided by Flowers' lawyer. L.F. 72; 80. ILM did not perform the "legal duty vs. job duty" analysis it now offers as its excuse for failing to defend a known executive officer, nor did it perform *any* other officer analysis. L.F. 61-68; 76; 81; 92. ILM even admits "[i]n assessing Flowers' tender of the defense of the suit, [ILM] did not analyze the claim as one against an executive officer." Resp. Subst. Brief, p. 18 (ILM does not explain how it

could possibly determine the officer coverage did not apply where it "did not analyze the claim as one against an executive officer"). That failure is precisely *why* ILM breached its duty to defend a known executive officer.

In some states ILM's strict "four corners" approach focusing "only" on the allegations to determine the duty to defend is correct. See TCD, Inc. v. Am. Fam. Mut. Ins. Co., 296 P.3d 255, 259 (Col. App. 2012) (explaining "[a]n insurer's duty to defend arises solely from the complaint in the underlying action'") (citation omitted); Holz-Her U.S., Inc. v. United States Fid. and Guar. Co., 539 S.E.2d 348, 349-50 (N.C. App. 2000) (courts "[r]ead the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded"); Sustache v. Am. Fam. Mut. Ins. Co., 735 N.W.2d 186, 191 (Wisc. App. 2007) ("the four corners rule is the law[]"); Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tx. 1997) (accord).

But in Missouri "[a]n insurer cannot determine its duty to defend solely on the facts alleged in the petition. Rather it must also consider the petition in light of facts it knew or could have reasonably ascertained." Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64, 83 (Mo. App. 2005). ILM admits it failed to consider the petition in light of the known and truthful facts. Resp. Subst. Brief, p. 18. "'[E]ven though the pleadings do not show coverage, where known or reasonably ascertainable facts become available that show coverage[,] the duty to defend devolves upon the insurer.'" Id. (citation omitted).

ILM is asking this Court to bail it out for using the *wrong* duty to defend test, and for admittedly failing to do *any* analysis of the known facts and officer coverage. This Court should reject that request.

ILM is also asking this Court to bail it out for using the wrong *coverage* analysis, because, even under ILM's erroneous "four corners" test, the petition's generic "agent or employee" allegations alone *include* the executive officer. L.F. 57. See Gunnett v. Girardier Bldg. And Realty Co.,70 S.W.3d 632, 637 n.5 (Mo. App. 2002) (explaining "[w]e consider the term co-employee to include a corporate officer[. . .]"; § 287.020.1.

ILM is also asking this Court to overlook its in-house counsel ignoring the insured and taking no action. L.F. 81; 92; 363. The in-house counsel had the claim file on his desk for over *seven months*, from October 7, 2008 through May 14, 2009, L.F. 81, 92, yet at the end of the day, ILM expended more energy in entering an amount paid of ".00" and a claim status of "closed" than in having its counsel communicate with Flowers. L.F. 92; 363. ILM's spin is that the in-house counsel, too, used a four corners test and so "ILM maintained its coverage position in light of the actual allegations in the Reynolds County petition." Resp. Subst. Brief, p. 5. The in-house counsel did not "maintain" anything; that is why ILM cannot cite the legal file for this statement. Id.

The truth is the in-house counsel did *nothing*, L.F. 92, 363 (he did not write one memo, letter, or email), despite having the applicable coverage facts and officer analysis from Flowers' lawyer. L.F. 72 ("Junior Flowers is not an employee of Missouri Hardwood Charcoal[]"); L.F. 80 ("I would direct your attention to Section II 2.A on page 9 of 16 of the commercial GL policy . . .[t]he language seems to clearly state that

coverage is provided to executive officers and stockholders. Junior Flowers is both for Missouri Hardwood Charcoal"). Flowers' lawyer also explained the co-employee exclusion could not apply because "[i]t appears to me that suits by 'co-employees' are only disallowed if the defendant is defined as an employee or a volunteer worker. . . . I therefore think Junior Flowers has coverage as an executive officer[]"). L.F. 80.

But ILM ignored these facts, and ignored the policy language correctly analyzed by the insured, and ignored controlling Missouri law, because it used the wrong test for duty to defend, L.F. 76, and because it thinks its coverage is for the non-viable "breach of a non-delegable duty of the corporation" cases (a position it did not tell the insured), Transfer App., p. 11, yet not for the *only* type of case a co-employee can pursue against an executive officer or any other employee in Missouri (another position it did not tell its insured). Resp. Subst. Brief, p 18. This is an utter failure to properly handle the claim. See Advantage Bldgs. & Exteriors, Inc. v. Mid-Cont. Cas. Co., __S.W.3d__; 2014 WL 4290814 at *4 (Mo. App. Sep. 2, 2014) (explaining "[t]he insurer must conduct any investigation and analysis of the claim 'with reasonable diligence' and must 'promptly notif[y] the insured of its position once the process is complete'") (quoting 3 New Appleman On Insurance Law Library Edition, § 16.03 [3][d][i] (2014). A reasonable insurer would have done *some* investigation, *some* analysis, and communicated *some* position about its officer coverage; and then either defended under a reservation of rights or filed a declaratory judgment action seeking a coverage determination.

Not only did ILM not perform the "legal duty vs. job duty" analysis when determining its duty to defend (depriving the insured of the opportunity to explain why

that analysis fails, which would have avoided this entire case), it also did not use that analysis in the judgment the trial court requested ILM's attorneys prepare. L.F. 9 (trial court's June 10, 2013 docket entry ordering "Attorney for Indiana is to prepare formal order"). Instead the attorneys wrote and the trial court signed a conclusory finding unsupported by any case that there was no duty to defend because the suit "[w]as based on alleged co-employee liability of Flowers." L.F. 455; A-10. ILM should not be permitted to offer its recently contrived excuses here when it did not give the insured a chance to consider and defeat them years ago.

ILM's argument at its core is that the *same* accident, and *same* wrongful death claim, against the *same* person, seeking the *same* damages, based on the *same* facts, alleging the *same* work conduct of requiring a kiln door to be leaned upright may be covered or not depending on the *legal* duty at issue, regardless of whether the defendant was negligently performing *job* duties. Resp. Subst. Brief, pp. 66-69. In fact ILM agrees the petition alleged Flowers *was* performing job duties, admitting "[i]t is uncontroverted that the petition alleged that Flowers was acting within the scope of his employment or performance of duties for the corporation." Id. at 71. The fact that Flowers was negligent in the scope of performing his corporate duties is exactly why ILM's "ambiguous at best" coverage was triggered. Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506, 510 (Mo. banc 1999) (explaining the term officer "duties" is "[a]mbiguous, at best, and the Court is bound to construe it against the insurer and in favor of coverage"); L.F. 142 (CGL); L.F. 154 (Umbrella).

The coverage is for workplace *conduct* "duties," not legal duties; it is "scope and course" coverage. See Middlesex Mut. Assur. Co. v. Fish, 738 F.Supp.2d 124, 134-35 (D. Maine 2010) ("'[a]bsent a narrower definition of 'duties of office,' when a policy extends coverage to executive officers acting 'with respect to their duties as officers,' the coverage should be construed to include **all work-related activities** performed by executive officers—whether menial or managerial. . .'") (emphasis added) (citation omitted); Martin, *supra*, 996 S.W.2d at 510 (finding officer coverage based on insured's argument that "**[a]ll job responsibilities performed by executive officers are included in their duties as officers** . . .") (emphasis added); contrast with Gunnett, *supra*, 70 S.W.3d at 639 (explaining *legal* duty "'[i]s entirely a question of law . . . and it must be determined only by the court'") (quoting W. Prosser, Law of Torts, § 37 at 236 (4th ed. 1971)).

The "scope and course" nature of the coverage is evidenced, too, by a plain reading of the phrases used in ISO form CGL policy. The coverage for individuals in Section II.1, pertaining to the business' "owner," "partner," "member," "manager," "officer" or "trustee" (depending on the type of insured entity) is triggered by "conduct of a business," or "duties," L.F. 142; and, likewise, the coverage for individuals in Section II.2, pertaining to traditional paycheck "employees" or "volunteer workers," is triggered by "performing duties related to the conduct of your business," or "acts within the scope of their employment by you or while performing duties related to the conduct of your business." L.F. 142 (Section II.2.a). ILM sold "scope and course of duties" coverage not "theory of liability," "capacity," or "legal duty" coverage.

In fact by ILM's own definition the executive officer is not a "capacity," or "allegation in a lawsuit," or legal duty at all, but is instead **"[a] person** holding any of the officer positions[.]" L.F. 146 (Section V.6) (emphasis added). Flowers was that "person" and ILM knew that from the outset. L.F. 80. This Court should reject ILM's clever "legal duty" construction of its policy, which only lawyers might understand, and instead use a construction that a layman like Flowers would understand. Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695,698 (Mo. banc 1982) (explaining courts use "'the meaning that would ordinarily be understood by the layman who bought and paid for the policy'") (citation omitted).

It is telling that ILM refuses to offer this Court a concrete construction of its "duties as your officers" language (L.F. 142), instead arguing the coverage is not for the only viable type of negligence case by a co-employee against an officer because of the word "personal." Resp. Subst. Brief, 16-17. Although ILM avoids spelling it out, it believes the coverage is limited to managerial "capacity" cases. Id. at 32; 35. This is the same belief held by the insurer in Martin, but that company had the courage to state the position concretely so this Court could refute it outright. Martin, *supra*, 996 S.W.2d at 510 (rejecting the insurer's argument "[t]hat 'duties as officers' include only those portions of an officer's position that are managerial in character").

On the last full page of its brief, though, ILM finally admits its coverage is for "scope and course" duties not legal duties, agreeing with appellants that to determine coverage courts "look to the facts of the case regarding the scope of the executive officer's duties for the particular corporation." Resp. Subst. Brief, p. 75. ILM's gloss on

this point is that, with respect to the "scope" of Flowers' duties for the corporation, "[t]here are questions of fact whether the allegations in the original Reynolds County petition were part of Flowers' executive officer duties." Id. This is the exact question (indeed the *only* question) ILM should have asked when Flowers' lawyer told ILM Flowers was the corporation's executive officer. L.F. 80 ("I therefore think Junior Flowers has coverage as an executive officer"). Asking that *one* question--instead of refusing to investigate, analyze, and communicate--would have avoided this case because ILM would have defended.

On the question of whether the petition alleged the kiln door order was part of Flowers' officer duties, ILM admits "[t]he petition alleged that Flowers was acting within the scope of his employment or performance of duties for the corporation." Resp. Subst. Brief, p. 71. The "performance of duties for the corporation" by a *known* "[p]erson holding any of the officer positions," L.F. 80, 146, establishes beyond credible argument the potential for coverage from day one. Truck Ins. Exch., *supra*, 162 S.W.3d at 83 (explaining "[t]o invoke the duty to defend, the allegations, combined with the ascertainable facts, need only establish *potential* or *possible* coverage under the policy"). (emphasis in original). Further, this question of fact was answered conclusively in Reynolds County and cannot be relitigated. L.F. 127 (concluding Flowers was negligent as executive officer in "requiring such policy to be followed"); see Assurance Co. of Am. v. Secura Ins. Co., 384 S.W.3d 224, 233 (Mo. App. 2012) (explaining the insurer is "[b]ound by the issues and questions necessarily determined in the underlying judgment[]").

Not only did ILM's adjuster not do the "legal duty" analysis ILM now relies on, but no adjuster should ever be permitted to do so. Missouri appellate courts do not even agree on the correct legal duty for co-employee negligence cases that arose during 2005-2012 (see footnote 3 *infra*). The complexity of legal duty analysis and the ongoing interpretation and application of the Chapter 287 immunity in relation to Missouri's negligence law highlights why insurance adjusters should not be permitted to deny claims based on parsing negligence law into "covered versus non-covered" legal duties arising out of the same facts and accident. In addition to the 2005 amendment to Chapter 287 requiring strict construction, and the court of appeals' initial guidance about that amendment,[1] which guidance appellants relied on in presenting their case in Reynolds County, and the court of appeals' later clarification of its initial guidance, which came after appellants' trial,[2] the Legislature again changed co-employee liability in 2012 permitting an action only for an "affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." § 287.120.1.

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[1] Robinson v. Hooker, 323 S.W.3d 418, 425 (Mo. App. 2010) (holding "[t]he employee retains a common law right of action against co-employees who do not fall squarely within the definition of 'employer'") (this is the standard appellants used).

[2] Hansen v. Ritter, 375 S.W.3d 201, 207 (Mo. App. 2012) (explaining "[t]he 2005 amendment required abrogation of the practice . . . of affording co-employees immunity under the Act if they are alleged to have breached the employer's duty to provide a safe workplace") (citation omitted).

Since then the districts of the court of appeals disagree about the proper test for co-employee negligence for 2005-2012 cases, with two opinions transferred to this Court by dissenting judges under Rule 83.03 from the Southern District and the Eastern District.[3] The Western District has concluded "[t]hat for workplace injuries occurring between the effective dates of the 2005 and 2012 amendments of the Act, the common law, and not the refined 'something more' test, must be applied to determine whether a co-employee owes a duty of care in negligence." Leeper v. Asmus, __S.W.3d__; 2014 WL 2190966 at *15 (Mo. App. W.D. May 27, 2014).

As appellants correctly recognized years before trial the "something more" concept had lost legal significance, explaining at the hearing on Flowers' motion to dismiss in January, 2010, "I tried to tackle the something more analysis and having thought about it I don't think that can apply any more under the strict construction analysis [under Chapter 287]." L.F. 99-100. So ILM could not really have based its duty to defend on the "something more" judicial construct, like it postures here, because the construct did not exist after 2005. This Court should not permit an Indiana adjuster to use these changing "legal duties" to determine the duty to defend (which he really did not do anyway, L.F. 61-68, 71, 76, 81, 92-- just in the brief).

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[3] Parr ex rel. Waid v. Breeden, 2014 WL 3864710 at *22 (Mo. App. S.D. August 6, 2014) (transferred by Hon. William W. Francis, Jr., C.J., P.J.); Peters v. Wady, 2014 WL 4412193 at *8 (Mo. App. E.D. September 9, 2014) (transferred by Hon. Glenn A. Norton, J.).

ILM tries to create relevance out of the fact that appellants did not know about Flowers' executive officer title for most of the underlying proceedings (until discovery after remand from the Southern District), so they used the generic "employee" for years until they received the same correspondence ILM had. Resp. Subst. Brief, pp. 4-7. Offering the undisputed truth known to ILM a couple months after discovering it is not 'crafting' or 'amending' anything. Naturally appellants continued to use "employee" (as well as foreman and supervisor) until they learned what ILM already knew. But ILM's duty to defend is not based on appellants' *ignorance* of Flowers' corporate title; it is based on ILM's *knowledge* of it when it denied a defense. See Standard Artificial Limb, Inc. v. Allianz Ins. Co., 895 S.W.2d 205, 210 (Mo. App. 1995) ("[t]he facts known or ascertainable control the obligation to defend"); Brand v. Kansas City Gastro. & Hepatology, LLC, 414 S.W.3d 546, 553 (Mo. App. 2013) ("'[t]he insurer cannot ignore . . . actual facts known to it[]'") (citation omitted).

ILM also claims appellants flip flop in calling Flowers an employee. Resp. Subst. Brief, p. 60. The truth is Flowers told ILM *immediately* that he did not consider himself a traditional paycheck employee. L.F. 72 (September 26, 2008) ("Junior Flowers is not an employee"). So that *same* position based on Flowers' factual belief was presented in court. L.F. 105:23-106:6 (January 5, 2010 motion hearing), 119 (2012 trial affidavit); 124 (2012 judgment finding "Mr. Flowers was not an employee . . . [because] he did not receive a paycheck[]"). Under the judgment and under ILM's policies, however, Flowers is the "executive officer," not the employer. L.F. 123 (judgment finding Flowers "[w]as

the president, executive officer[]"); L.F. 146 (definition of "executive officer," right below definition of "employee").

ILM does not dispute that the facts presented at trial are all true; nor does it dispute it knew those true facts all along; nor that the underlying action was always a statutory wrongful death negligence case arising out of an accident. Presenting the known true facts and the known legal theory cannot be prejudicial. See Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258, 271 (Mo. banc 2013) (explaining "[p]rejudice from a failure of notice of an amended petition can be shown where the new petition alleges a new theory of liability that the insurer was not aware of previously"). Accordingly, this Court should reverse the trial court and enter judgment in appellants' favor on Count II of their petition.

III. Reply to ILM's Amendment Argument (ILM's Argument I)

Based on ILM's breach of the duty to defend *alone* this Court should reverse the trial court's judgment without reaching its erroneous application of the policy's cooperation provision and employer-related exclusions. L.F. 449-454; A-4-9. See Columbia Cas. Co., *supra*, 411 S.W.3d at 265 ("[t]he insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend") (citing Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 708-09 (Mo. banc 2011)).

This legal principle has been Missouri law for a century. See Murch Bros. Const. Co. v. Fid. & Cas. Co. of New York, 176 S.W. 399, 406 (Mo. App. 1915). There, the court of appeals explained the insurer's wrongful refusal to defend "'**cut at the very root**

of the mutual obligation and put an end to its right to demand further compliance with the supposed terms of the contract on the other side.'" Id. at 406 (quoting St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co., 201 U.S. 173, 181 (1906)) (emphasis added). Likewise ILM's breach cut the policies at the root of the mutual obligation years ago, ending its right to demand further compliance from Flowers.

The Murch Court was specifically confronted with the effect of an amended petition, and reasoned:

> But, the Casualty Company having abandoned the defense of the case, was it entitled to notice of any further steps that might be taken in it, such as changing the pleadings or effecting a compromise? We think not.

Id. at 406.

Elsewhere the court of appeals has analyzed this issue thus:

> 'It is difficult to see why an insurer should be allowed, on the one hand, to deny liability and thus, in the eyes of the insured, breach his contract and, at the same time, on the other hand, be allowed to insist that the insured honor all his contractual commitments.'

Community Title Co. v. Safeco Ins. Co., 795 S.W.2d 453, 461 (Mo. App. 1990) (quoting Stephens v. State Farm Mut. Auto Ins. Co., 508 F.2d 1363, 1366 (5th Cir. 1975)); see also Charles v. Consumers Ins., 371 S.W.3d 892, 898 (Mo. App. 2012) (explaining "[i]f the carrier wrongfully denies coverage, it has breached its contractual obligation, and, in turn, the policyholder is relieved of his obligations under the contract"). ILM should be

precluded from relying on its cooperation provision and its employer-based exclusions, and Flowers should be "relieved of his obligations under the contract."

ILM believes preclusion must be used procedurally as a shield to "ILM's answer and counterclaim," instead of as a sword and legal consequence of ILM's breach of the duty to defend. Resp. Subst. Brief, pp. 44-45. But appellants' preclusion argument is not a "defense" to ILM's defenses, it instead results from ILM's breach of its duty to defend *as a matter of law*--which was a legal count in appellants' petition at all times. L.F. 15-16 (Count II). Further, procedurally appellants adopted by reference their entire petition when replying to ILM's counterclaim so the breach of the duty to defend consequences were in fact pleaded as a shield. L.F. 33, Reply to Counterclaim, ¶ 4.

ILM also argues appellants did not make any legal argument about preclusion to the trial court so they should not be able to here. Resp. Subst. Brief, pp. 44-45. This is false. Appellants made the preclusion argument in their legal memorandum in support of their motion for summary judgment. Under this Court's Rule 81.12(b) "briefs and memoranda" are omitted from the record, thus appellants cannot direct this Court to the specific briefs before the trial court. Appellants, however, will gladly obtain certified copies of the relevant legal memorandums should this Court deem that helpful. What those certified copies will show is that at page 9 of their initial memorandum appellants wrote:

> "As might be expected, ILM's breach of its duty to defend leads to certain consequences under the law. As the Court of Appeals wrote:

> The legal consequences to the insurer from the breach of contract for unjustified refusal to defend on the ground of noncoverage include the loss of its contractual right to demand that the insured comply with certain prohibitory as well as affirmative policy provisions.
>
> Truck Ins. Exch., *supra*, 162 S.W.3d at 89 (quoting Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d 475, 481 (Mo. App. 1992))."

The certified copies will also show that later in that same memorandum at pages 12-13 appellants wrote:

> "In this regard, the Schmitz Court went on to say the insurer was not only bound to the section 537.065 agreement, but also "[w]as bound to the trial court's judgment awarding the parents $4,580,076 because it had an opportunity to control and manage the trial but failed to seize it." Id. Likewise, ILM is (1) bound by the § 537.065 agreement because it breached its duty to defend, and (2) bound by the judgment because it had the opportunity to defend. . . . ILM is bound by the judgment and should be ordered to pay it."

These are quotes from appellants' first brief to the trial court. To be sure, appellants make the argument *better* here, but that is because appellants have the benefit of this Court's articulation of the Schmitz preclusion principle as expounded in Columbia Casualty, which was issued on August 13, 2013, shortly after proceedings concluded in the trial court. L.F. 9, 446-456, A-1-10 (the trial court signed a judgment form prepared by ILM's attorneys on July 25, 2013).

On the merits of its amendment argument, ILM is asking this Court to find, as a matter of first impression, an amendment where there was no request to amend anything, L.F. 281-314, and no new paper petition filed, based on evidence that ILM failed to make part of the record, L.F. 129-30, and where the court took judicial notice of its entire paper file, L.F. 283, which included the petition and answer thereto. L.F. 56-59; 252-58. As can be seen, there was no amendment and this Court should reject ILM's request to create one.

ILM is also effectively asking this Court to presume the wrongful death court entered an invalid judgment, involving a legal duty that is not viable in Missouri, requiring this Court to collaterally attack the court's legal conclusion imposing common law negligence liability on Flowers, L.F. 127, and attack its legal conclusion that Flowers' non-delegable duty affirmative defense failed, L.F. 127, and relitigate its finding that he was not the employer, L.F. 124, and find the facts are not in accord with the result reached. This Court should also reject that request. State v. Superior Mfg., 373 S.W.3d 507, 511 (Mo. App. 2012) (judgment has a strong presumption of validity).

ILM is also asking this Court to believe that appellants first vigorously opposed Flowers' "employer" based affirmative defense for years in Reynolds County, submitting two briefs in opposition to Flowers' motion to dismiss, L.F. 205-07, 210-13, having a hearing on the motion to dismiss, L.F. 93-114, initially losing on the defense, L.F. 218, then winning on appeal, L.F. 222-29, and then after remand suddenly adopting Flowers' affirmative defense as their case, before the *same* judge that entered judgment against

them on that defense. Resp. Subst. Brief, p. 23. Appellants were not that foolish because Judge Parker would have unhesitatingly entered judgment against them again. L.F. 218.

Even worse, ILM is not only asking this Court to believe appellants were foolish enough to submit a dismissible case to the same judge that previously dismissed it, but also that Judge Parker suddenly ignored the law, did "a 180-degree turn," Resp. Subst. Brief, p. 21, and entered an erroneous judgment. This Court should reject ILM's subterfuge.

Plus appellants would have had no reason to risk dismissal because the case was covered, whether menial or managerial, where ILM had all the true facts, L.F. 72, 73, 75, 80, which appellants later presented at trial. L.F. 119-20, 129-30. The difference is ILM ignored the truth whereas appellants used it.

It is only by isolating and construing counsel statements and arguments that ILM is even able to make this amendment argument. See State v. Forrest, 183 S.W.3d 218, 226 (Mo. banc 2006) (counsel statements and argument are not evidence). At best for ILM, appellants' counsel inartfully argued the case at trial. L.F. 310-11. But the same challenge ILM now makes--that appellants' case was open to attack based on the non-delegable duty defense--could have been made at *any* stage of the case.

These cases are decided on a case-by-case basis, depending on the unique facts and circumstances of each case (not by isolating phrases), which is a factual question that has already been conclusively answered by the wrongful death court (L.F. 121-28). See Arnwine v. Trebel, 195 S.W.3d 467, 477 (Mo. App. 2006) (controlling case law at the time the petition was filed in 2008, the 2005 Chapter 287 strict construction mandate

notwithstanding). "Because the question of what constitutes an 'affirmative negligent act' or 'something extra' is not susceptible to precise definition, the co-employee liability rule has been developed and applied over the years 'on a case-by-case basis with close reference to the facts in each individual case.'" Id. (quoting State ex rel. Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. banc 2002)). "A fact dependent inquiry must be undertaken to determine whether liability may be imposed on the co-employee." Gunnett, *supra*, 70 S.W.3d at 635.

Appellants told the wrongful death court "[t]he test is whether the co-employee personally created or contributed to create a dangerous condition that a reasonable person would recognize as hazardous and beyond the usual requirements of employment." L.F. 206 (also citing Arnwine, *supra*, 195 S.W.3d at 477-78). This is because "[t]he creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work . . . Such acts constitute a breach of personal duty of care owed to plaintiff." Id. at 478.

Requiring people to follow a policy of leaning a kiln door upright, L.F. 127 (Judge Parker concluding Flowers was negligent for "requiring such policy to be followed"), having been previously personally cited, L.F. 58, ¶ 12, on a day with wind gusts of 30 MPH, L.F. 123, ¶ 9, after an employee told Flowers he saw one of the doors fall, L.F. 126, ¶ 20, and based on all the other unique facts and evidence presented at trial in the comprehensive OSHA records, L.F. 129-30 (list of trial exhibits), met the "creation of a hazardous condition" standard for a co-employee negligence case (and appellants argued as much all along, L.F. 206-07). This Court should reject ILM's invitation to second-

guess the court. L.F. 312 (Judge Parker recognizing the importance of the unique facts, stating "Well obviously I need to take this matter under advisement, read the exhibits, contemplate the evidence presented").

A reasonable insurance company would have defended for the very purpose of seeking dismissal based on the "non-delegable duty" argument; smart insurers do that in co-employee negligence actions every time in Missouri (the availability of a legal defense is yet another reason ILM should have defended). See cases cited in footnotes 1-3, *supra*.

There was no amendment, but even assuming *arguendo* there was, there was no prejudice to ILM. ILM's specific claim of prejudice is that it would have submitted a motion to dismiss based on the non-delegable duty defense just like Flowers' attorney did. Resp. Subst. Brief, p. 34; L.F. 203-04; 208-09. The first problem with this argument is no fact of record supports any such inference. The more likely inference from ILM's repeated denials despite knowing Flowers was an officer, L.F. 80, and recognizing he was sued for performing in the scope of his corporate duties, Resp. Subst. Brief, p. 71, is ILM would have kept using the inapplicable co-employee exclusion whether appellants or anyone else discovered the facts in its possession. This is because ILM would have always lead itself astray by mistakenly using the "four corners" test for its duty to defend, L.F.76, and erroneously thinking it only covered managerial "capacity" instead of understanding the officer is a covered "person." L.F. 61-64, 76, 81, 92; L.F. 146 (definition of "executive officer"); Resp. Subst. Brief, p. 35.

The next problem is ILM could have submitted such a motion (same as Flowers did) when it received the petition and knew all the facts, and recognized the potential for

coverage yet deserted its insured. L.F. 76, 81, 92. The final problem is Flowers' attorney pursued this very issue in a motion to dismiss based on Chapter 287 employer immunity, L.F. 208-09, and as an affirmative defense that the wrongful death court concluded was invalid. L.F. 127. ILM's apparent position is it would have somehow prevailed on these same defenses where the lawyer it forced Flowers to hire did not prevail. There cannot be prejudice to ILM in these circumstances.

It is also worth noting that both ILM's amendment argument that under the wrongful death judgment Flowers is the "employer," Rep. Subst. Brief, p. 46-50, and its "non-delegable duty" argument would have defeated the underlying action *as a matter of law* if successful--based on Chapter 287 immunity for the former, and common law negligence principles for the latter. See Hansen v. Ritter, 375 S.W.3d 201, 218-19 (Mo. App. 2012). That is the very essence of relitigation and it is impermissible. See Assur. Co. of Am. v. Secura Ins. Co., 384 S.W.3d 224, 233 (Mo. App. E.D. 2012) (explaining "[w]here the insurer had the opportunity to defend the insured but wrongfully refused to do so, '[t]he insurer is precluded from relitigating any facts that actually were determined in the underlying case and were necessary to the judgment'" (quoting John H. Mathias, *et al.*, Insur. Cov. Disputes, § 9.01[1] at 9-4—9-5 (1996))

Also, ILM's admission that "[**F]lowers qualified as an insured under the policy in his capacity as an executive officer as to the Reynolds County judgment**," Transfer App., p. 6 (emphasis added) is an admission that he is not the employer. That is because the officer coverage is for a specific type of employee, L.F. 142, whereas the exclusions

are for the employer, L.F. 135, and Flowers cannot be both at the same time as a matter of law. State ex rel. Mann v. Conklin, 181 S.W.3d 224, 227 (Mo. App. 2005).

ILM also makes a tacit "collusion" argument, stating that about a month before trial in Reynolds County appellants and Flowers' counsel "discussed the evidence for trial." Resp. Subst. Brief, p. 9. Like ILM's argument about the Schmitz preclusion briefing in Cole County, this statement is false. In reality, ILM is directing this Court to an email from Flowers' counsel *asking* appellants to tip their hand about their trial evidence. Id. (citing L.F. 261). But appellants never did that (that is why ILM cannot direct this Court to any actual discussion of the evidence by appellants), and instead presented the evidence and exhibit index for the first time at trial. L.F. 129-30; L.F. 283-91. There was no collusion. See Cologna v. Farmers and Merchants Ins. Co., 785 S.W.2d 691, 700-01 (Mo. Ct. App. 1990) (no collusion where insured agreed to waive a jury trial, not contest liability, not contest damages, and not offer evidence at trial). For the foregoing reasons this Court should reverse the trial court and enter judgment in favor of appellants on counts I and II of their petition.

IV. Reply to ILM's Severability Provision Argument (Resp. Subst. Brief, pp. 51-57)

Simpson does not help ILM. Resp. Subst. Brief, pp. 52-54. It is a 55 year old case that does not involve a severability clause (it was essentially an "*any* insured" analysis not a "*the* insured" analysis; as the court noted "the policy in our case was issued in the conjunctive"). Simpson v. American Auto. Ins. Co., 327 S.W.2d 519, 527-28 (Mo. App. 1959). The Simpson Court explicitly acknowledged it was not analyzing any

exclusionary language that applied independently to 'the insured' "'against whom liability is sought to be imposed,' or 'against whom an action is brought,'" id. at 528, which is the language at issue here and which would have led to a different result in Simpson. L.F. 145-46, 159.

ILM misreads Bituminous. Resp.'s Subst. Brief, pp. 54-56. Bituminous first cited Simpson to say "[t]he employee exclusion standing alone would have the effect of excluding all coverage as to an injured employee. . . ." Bituminous Cas. Corp. v. Aetna Life and Cas. Co., 599 S.W.2d 516, 520 (Mo. App. 1980) (emphasis added). Bituminous then clarified the exclusion was not "standing alone" and that, "[t]he question of the effect of the severability clause, however, is of first impression in Missouri." Id. Bituminous concluded "[t]he employee exclusion is limited in its operation by the severability clause to cases in which an injured employee seeks to impose liability upon his employer." Id. (emphasis added). Without the predicate employer/employee relationship, the "[e]mployee exclusion is wholly extraneous and inapplicable." Id.

Bituminous did not "reject" Zenti, Resp's Subst. Brief, p. 56, to the contrary, it expressly noted its ruling was **"[c]onsistent with the trend of the later cases. See Zenti**." Id. (emphasis added). Bituminous merely cited Zenti in the footnote as a source of cases that come down on various sides of the issue. Id. at n. 2 (directing parties to "See authorities collected in Zenti"). Zenti itself applied the severability provision to the executive officer with respect to the employer exclusion holding "[t]he employee exclusion was inapplicable here and thus Home Insurance is obligated to defend Zentis as 'executive officers' against a suit for damages brought by [the employee]." Zenti v.

Home Ins. Co., 262 N.W.2d 588, 592 (Iowa 1978). That is the "trend of the later cases" Bituminous refers to.

Baker stands for the uncontroversial proposition that the employer exclusion, when read in concert with the severability provision, does not apply unless the injured person was an employee of the specific defendant insured. Baker v. DePew, 860 S.W.2d 318, 322 (Mo. banc 1993) (explaining "[w]e reached the same conclusion that the court of appeals reached in Bituminous, i.e., that the employee exclusion clause is not applicable"). Baker applied the cross-employee exclusion (not the employer exclusion) because the case did not involve executive officer coverage where the executive officer is specifically carved out of the exclusion like in Martin. Id. at 322-23. No court anywhere has ever applied either the workers compensation or employer exclusion to exclude coverage for an executive officer where there was a severability provision. Neither of the unpublished federal magistrate orders ILM cites involved a severability clause. Resp. Subst. Brief, pp. 47-48.

ILM appears to see significance in the phrase "in any other capacity" from the employer exclusion (although it does not direct this Court to any relevant case). Resp.'s Subst. Brief, pp. 51-57. That phrase, however, simply applies where there is *first* the predicate employer/employee relationship, *and then* the plaintiff is attempting to impose liability on the employer in another capacity; for example, as a premises owner or manufacturer of a defective product. See Deters v. USF Ins. Co., 797 N.W.2d 621, at *9 (Ia. App. 2011) (holding the phrase "does not add [the executive officer] to the employer's liability exclusion"). This language is relevant in states that recognize the

"dual capacity" doctrine where an employer may have a workers' compensation obligation, and then be liable in tort in some other capacity depending on the circumstances. See Cassani v. City of Detroit, 402 N.W.2d 1 (Mich. App. 1987) (explaining "[t]he dual capacity doctrine recognizes that an employer can, under certain circumstances, occupy a status in addition to that of employer with respect to his employee"); Baker v. Aetna Cas. & Surety Co., 669 N.E.2d 553, 556-58 (Oh. App. 1995) (explaining the ISO form Section I.A.2.e employer exclusion, which is the same as ILM's, L.F. 135, was drafted "in an attempt to eliminate dual capacity claims" from coverage).

Finally, it is worth noting the purpose of the employer based exclusions is to avoid subjecting the employer to two liabilities, first in a workers' compensation tribunal, and then again in court. Because Flowers the corporate officer could not be subject to workers' compensation liability, L.F. 447 (the workers' compensation claim was concluded against Missouri Hardwood Charcoal, Inc. not against Flowers), the purpose of the exclusions is not served by applying them to Flowers.

Accordingly, for the foregoing reasons and based on the legal authorities cited this Court should reverse the trial court, enter judgment in appellants' favor on Counts I and II of their petition, deny ILM's motion for summary judgment in all particulars, and remand for calculation of the judgment and statutory interest at the rate of 9%.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 84.06(c)

The undersigned hereby certifies to the best of his knowledge, information, and belief that this Appellants' Substitute Reply Brief contains the information required by Rule 55.03; complies with the limitations contained in Rule 84.06(b); not counting the parts of the brief excluded under Rule 84.06(b) contains 7732 words, as counted by Microsoft Word, which is the word processing program used to prepare this Brief; and this Brief is in 13 point Times New Roman font.

/s/Tom Pirmantgen
Tom Pirmantgen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellants' Substitute Reply Brief was served on Respondent's Attorneys via e-filing system on November 30, 2014 to: Michael Hackworth, Hackworth, Hackworth & Ferguson, L.L.C., 1401 North Main, Suite 200, Piedmont, Missouri 63957, and to Robert Luder and John Weist of Luder & Weist, L.L.C., 9401 Indian Creek Parkway, Suite 800, Overland Park, Kansas 66210.

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